



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JAN 19 2017

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Consent Agreement and Proposed Final Order for In the Matter of Whole Foods Market Group, Inc., et al., RCRA-HQ-2017-0001

FROM: Susan Shinkman, Director *Rosemarie Kelley for*  
Office of Civil Enforcement

TO: Environmental Appeals Board

Attached for your review and approval is a Consent Agreement and proposed Final Order ("CAFO") to commence and conclude an action against Whole Foods Market Group, Inc., et al. (collectively "Respondents" or "Whole Foods Market"). Whole Foods Market asserts that Appendices A through F of the CAFO contain Confidential Business Information ("CBI"). The U.S. Environmental Protection Agency ("Complainant" or "EPA") and Respondents jointly request that the Environmental Appeals Board ("EAB") manage Appendices A through F in accordance with the CBI regulations at 40 C.F.R. Part 2 and only publish or otherwise release the redacted version of the CAFO. Two versions of the CAFO are attached as required by 40 C.F.R. § 22.5(d), a CBI version and a redacted version.

This memorandum is provided in accordance with the EAB Consent Agreement and Final Order Procedures.<sup>1</sup> I have reviewed the CAFO and determined that it is consistent with the Resource Conservation and Recovery Act ("RCRA") and with applicable EPA policies. EPA has provided notice to all relevant states regarding this CAFO, as required by RCRA § 3008(a)(2), 42 U.S.C. 6928(a)(2). This action is settled pursuant to 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3) before the filing of a complaint using the CAFO to simultaneously initiate and conclude the matter.

EPA's enforcement action against Whole Foods Market arises from the improper management of hazardous waste, specifically failure to properly make hazardous waste determinations, as well as the improper handling of universal waste (spent fluorescent lamps). Complainant evaluated this matter under the *RCRA Civil Penalty Policy* (June 2003) (hereinafter "Penalty Policy")<sup>2</sup> and has determined that \$2,000,000 is an appropriate penalty under the Penalty Policy for the violations disclosed by Whole Foods Market. In addition, the proposed settlement includes a Supplemental Environmental Project ("SEP") that is focused on protection of children's health through removal and replacement of PCB-containing fluorescent lamp fixtures in schools and community centers in low-income neighborhoods. This SEP is consistent with the *2015 Update to the 1998 U.S. Environmental Protection Agency*

<sup>1</sup>Environmental Appeals Board, Consent Agreement and Final Order ("CAFO") Procedures (revised: January 14, 2014).

<sup>2</sup> The *RCRA Civil Penalty Policy* (June 2003), available at: <https://www.epa.gov/sites/production/files/documents/rcpp2003-fnl.pdf>.  
Internet Address (URL) • <http://www.epa.gov>



*Supplemental Environmental Projects Policy* (March 2015) (hereinafter “SEP Policy”).<sup>3</sup> Whole Foods Market will pay a civil penalty of \$500,000 and expend \$2,750,000 on the SEP. Whole Foods Market has also agreed to extensive injunctive relief, as well as retaining an independent third party auditor to conduct a hazardous waste compliance audit of select Whole Foods Market stores.

#### **A. Statement of the Facts**

Altogether, Respondents<sup>4</sup> own and operate hundreds of retail grocery stores throughout the United States. They sell consumer products,<sup>5</sup> some of which may become “solid waste” when they are returned, expire, spill or are in a condition such that they cannot be used for their intended purpose. Some of the consumer products that become solid waste may be considered hazardous waste under RCRA by having the characteristic of ignitability, corrosivity, or toxicity.

On June 11, 2014, the New Mexico Environment Department (“NMED”) conducted a RCRA inspection of a Whole Foods Market Store in Santa Fe, New Mexico. On August 26, 2014, the NMED referred its findings to EPA Region 6 (“Region 6”) for further investigation and enforcement. Between August 2014 and August 2015, Region 6 conducted an investigation of Whole Foods Market. From the investigation, Region 6 concluded that Whole Foods Market failed to make a sufficient hazardous waste determination of its solid waste streams as required by 40 C.F.R. § 262.11(c) and that one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16 were not consistently complied with. As a result of Region 6’s investigation, Whole Foods Market entered into consent agreements and final orders for the stores located within Region 6’s jurisdiction.<sup>6</sup>

Following Region 6’s investigation and administrative settlements, on its own initiative Whole Foods Market approached EPA Headquarters to discuss the possibility of entering into a nationwide settlement agreement for their stores located in States and Territories other than those covered by the Region 6 administrative settlements. Whole Foods Market and EPA agreed that the settlement would provide for enhanced injunctive relief to guide the company’s compliance with RCRA, including enforceable obligations for Whole Foods Market to continue to develop and implement an electronic, state-of-the-art hazardous waste management program. The parties also agreed that Whole Foods Market would pay an appropriate civil penalty for the RCRA violations and retain an independent third party auditor to conduct a hazardous waste compliance audit of select Whole Foods Market stores.

For purposes of settlement, the parties agreed to resolve the following two RCRA violations:

- Failure to make a hazardous waste determination as required by 40 C.F.R. § 262.11 and

<sup>3</sup> EPA, Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy (March 10, 2015), available at: <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>.

<sup>4</sup> Nationally, Whole Foods Market is comprised of a number of wholly-owned subsidiaries of Whole Foods Market, Inc., each of which operates in defined regions of the country. In their day-to-day decision making and operations, each regional subsidiary operates independently of the others; thus, because this is a “global” settlement to cover all of Whole Foods Market stores, each of the regional subsidiaries are named in the complaint and covered by the settlement (except as noted in Footnote 6, *infra*).

<sup>5</sup> For purposes of this settlement, consumer products are defined in the attached Consent Agreement as “any merchandise sold by Respondents at Whole Foods Market stores, which if discarded, may have to be managed as RCRA hazardous waste.” See Paragraph 10(f) of the attached Consent Agreement.

<sup>6</sup> Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. owns and operates Whole Foods Market stores in Texas, Oklahoma, Arkansas, and New Mexico. Whole Foods Market entered into separate consent agreements and final orders for the stores within each state—Texas, Oklahoma, Arkansas, and New Mexico. Whole Food Company, Inc.—not a party to the enclosed Consent Agreement and proposed Final Order because it only owns and operates Whole Foods Market stores in Louisiana—entered into a consent agreement and final order for the stores within Louisiana. See USEPA Docket Nos. RCRA-06-2016-0904 through 0908 for the Region 6 CAFOs.



- Failure to comply with some of the universal waste standards set forth in 40 C.F.R. §§ 273.13 through 273.16.

The parties agreed that these two violations occurred at 373 stores—these stores are identified in Appendix A of the attached Consent Agreement.<sup>7</sup> Most, if not all, Whole Foods Market stores generate 100 kilograms of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. Rather than engage in extensive and costly fact-finding, the parties agreed to stipulate that the two violations occurred at least once at the 373 stores. Thus, Complainant alleges in the attached Consent Agreement that Whole Foods Market violated the above-stated two RCRA violations at 373 stores, for a total of 746 violations.

## **B. How the Settlement Addresses Each Violation**

Respondents have committed to a program of broad and significant operational changes in the attached Consent Agreement to help ensure proper waste management and RCRA compliance at its retail grocery stores. As stated above, most, if not all, Whole Foods Market stores are CESQGs. Under the Consent Agreement, Whole Foods Market has agreed to additional changes to its operations and to report annually to EPA on the implementation of its enhanced hazardous waste management program. Whole Foods Market generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators and, therefore, goes above and beyond the minimum requirements applicable under the law. Whole Foods Market has already started to implement its enhanced hazardous waste management program. The compliance provisions under Section VI (Terms of Settlement) of the attached Consent Agreement include the following key provisions:

- Whole Foods Market has already taken steps to implement, and will continue to implement, an advanced system to properly accumulate and store hazardous waste on-site, including inspections and management of containers.
- Whole Foods Market has begun to implement, and will continue to implement, comprehensive hazardous waste management training at its stores for employees.
- Whole Foods Market will put in place a wide-range of operational changes to ensure compliance with RCRA, including employing advanced technology for hazardous waste identification.
- Whole Foods Market will develop and implement Standard Operating Procedures to further assist its stores in implementing the enhanced hazardous waste program.
- Whole Foods Market will retain an independent third party auditor to conduct a hazardous waste compliance audit of select stores.

## **C. How the Proposed CAFO is Consistent with the Penalty Guidelines**

RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3), directs EPA to consider the seriousness of the violation and any good faith efforts to comply with applicable requirements when calculating a penalty. Consistent with this statutory direction, the Penalty Policy provides guidance on calculating penalties by: (1) determining the gravity-based penalty for a particular violation from a penalty assessment matrix; (2) adding a multi-day component, as appropriate, to account for a violation’s duration; (3)

<sup>7</sup> Appendix A contains 399 stores—this list includes 373 stores that were open at the time of the alleged RCRA violations (on or about June 14, 2014), as well as twenty-six (26) stores that opened in 2016. The twenty-six (26) stores that opened in 2016 were not included in the penalty calculation because Whole Foods Market had already implemented most of its enhanced hazardous waste management program.

adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances; and (4) adding to this amount the appropriate economic benefit gained through non-compliance.

## 1. Gravity-Based Penalty Calculation

The gravity-based penalty amount is based on an examination of two factors—the potential for harm as a result of the violation (“Potential for Harm”) and the extent of deviation from the statutory or regulatory requirement posed by the violation (“Extent of Deviation”).<sup>8</sup>

Whether the Potential for Harm is considered “Major,” “Moderate” or “Minor” involves an examination of two elements: “the risk of human or environmental exposure to hazardous waste and/or hazardous constituents that may be posed by noncompliance and the adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the RCRA program.”<sup>9</sup> Whether the Extent of Deviation of the violation is considered “Major,” “Moderate” or “Minor” involves an examination of the degree to which the violation at issue renders the requirement inoperative.<sup>10</sup> Pursuant to the Penalty Policy, Complainant evaluated whether the violation involved substantial non-compliance with the RCRA requirement, or substantial compliance, or whether the scope of the non-compliance fell somewhere in-between.<sup>11</sup>

As part of the gravity-based penalty calculation, Complainant referred to the Penalty Policy’s nine-cell penalty matrix—each cell contains a monetary range for the appropriate proposed penalty.<sup>12</sup> Over the years, this matrix has been updated for inflation.<sup>13</sup> The violations at issue in this matter occurred on or about June 11, 2014 (see the “Statement of the Facts” section of this memorandum) so Complainant used the Penalty Policy’s penalty matrix with a maximum penalty of \$37,500 per day for each violation.<sup>14</sup> The Penalty Policy states that “[t]he selection of the exact penalty amount within each cell is left to the discretion of the enforcement personnel in any given case.”<sup>15</sup>

As set forth above, Complainant concluded that Whole Foods Market committed no less than two violations at 373 stores for a total of 746 RCRA violations. Due to the facts of this case—and consistent with the Penalty Policy—Complainant decided not to assess multi-day penalties in this matter.<sup>16</sup>

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<sup>8</sup> See *RCRA Civil Penalty Policy* at 12-19 (discussing potential for harm and extent of deviation).

<sup>9</sup> *Id.* at 12.

<sup>10</sup> *Id.* at 16.

<sup>11</sup> *Id.* at 16-17.

<sup>12</sup> *Id.* at 18.

<sup>13</sup> RCRA § 3008(a)(3) assigns a maximum penalty of \$25,000 per day for each violation. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires EPA to periodically adjust penalties to account for inflation. See Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Public Law 101-410, enacted October 5, 1990, 104 Stat. 890); Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701 note; Public Law 104-134, enacted April 26, 1996; 110 Stat. 1321).

<sup>14</sup> EPA’s Civil Monetary Penalty Inflation Adjustment Rule establishes \$27,500 as the maximum civil penalty under RCRA § 3008 per violation, for violations occurring between January 30, 1997 and March 15, 2004; \$32,500 for violations occurring between March 16, 2004 and January 12, 2009; \$37,500 for violations occurring between January 13, 2009 and November 2, 2015. See 40 C.F.R. Part 19; 61 Fed. Reg. 69,360 (Dec. 31, 1996); 69 Fed. Reg. 7121 (Feb. 13, 2004); 73 Fed. Reg. 75340 (Dec. 11, 2008); 78 Fed. Reg. 66643 (Nov. 6, 2013).

<sup>15</sup> *Id.* at 19.

<sup>16</sup> See *RCRA Civil Penalty Policy* at 22-27 (discussing multi-day violations and penalties).



*a. Failure to properly make hazardous waste determinations as required by 40 C.F.R. § 262.11*

Whole Foods Market failed to make hazardous waste determinations for solid wastes generated at its stores. The proper and timely determination of solid and hazardous wastes generated and/or stored on-site is essential to a generator's waste management program. The purpose of the waste determination regulation is to identify those wastes that should be subject to appropriate management requirements under Subtitle C of RCRA because of the hazards they may pose in handling, transit, treatment, storage, and/or disposal. In this matter, Complainant determined that there was a moderate Potential for Harm based on the following: (1) there was relatively low risk of harmful exposure to workers and the public handling hazardous consumer products that were not properly identified as hazardous waste and (2) the overall impact posed by the alleged violation to the continued integrity of the RCRA program was not significant. Complainant determined that the Extent of Deviation from the regulatory requirement was moderate because Whole Foods Market systematically failed to make hazardous waste determinations.

The applicable Penalty Policy gravity-based penalty matrix cell range for moderate/moderate is from \$7,090 to \$11,330.<sup>17</sup> In this matter, Complainant analyzed and relied on case-specific factors in selecting an amount at the low end of the cell matrix, specifically \$7,090. The additional factors considered included the seriousness of the violation relative to other violations falling within the same matrix and the type of waste streams handled by the Respondents.

Based on these determinations, the total gravity-based penalty was calculated as 373 violations x \$7,090 = \$2,644,570.

*b. Failure to comply with some of the Universal Waste standards set forth in 40 C.F.R. §§ 273.13 through 273.16 (spent fluorescent lamps).*

Whole Foods Market improperly handled universal waste, specifically spent fluorescent lamps. As described above in the "Statement of the Facts" section of this memorandum, NMED inspected a Whole Foods Market Store in New Mexico. The inspection revealed spent fluorescent lamps located in containers that were not closed and properly labeled. Complainant determined that this violation presented a moderate Potential for Harm. Open containers and loose lamps lead to an increased possibility of breakage of a lamp. Breakage of a lamp could release mercury into the environment, presenting a risk to humans, including employees working at a store, as well as environmental receptors. Complainant determined that the Extent of Deviation from the regulatory requirements was moderate because—if the NMED inspection is an indicator of other Whole Foods Market stores—Whole Foods Market had stored most of the spent fluorescent lamps in boxes.

The applicable Penalty Policy gravity-based penalty matrix cell range for moderate/moderate is from \$7,090 to \$11,330. In this matter, Complainant analyzed and relied on case-specific factors in selecting an amount at the low end of the cell matrix, specifically \$7,090. The additional factors considered included the seriousness of the violation relative to other violations falling within the same matrix. Respondents complied with some of the universal waste standards and there was no evidence of breakage or improper disposal. Based on these determinations, the total gravity based penalty was calculated as 373 violations x \$7,090 = \$2,644,570.

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<sup>17</sup> See EPA, Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009 (Apr. 6, 2010), available at: <https://www.epa.gov/sites/production/files/documents/revisionpenaltypolicy04910.pdf>.



Based on the above considerations and calculations, the total gravity-based penalty prior to adjustments was **\$5,289,140**.

## **2. Gravity-Based Adjustments**

### *a. Good Faith Efforts to Comply*

RCRA § 3008(a)(3), 42 U.S.C. §6928(a)(3), requires EPA to consider good faith efforts to comply when calculating a penalty. Under the Penalty Policy, EPA may reduce the gravity-based penalty up to 25% based on “ordinary circumstances” or “from 26% to 40% . . . , in unusual circumstances.”<sup>18</sup> The Penalty Policy goes on to state that a “violator can manifest good faith by promptly identifying any noncompliance or instituting measures to remedy the violation before the Agency detects the violation.”<sup>19</sup> Although Region 6 had recent administrative settlements with Whole Foods Market,<sup>20</sup> Whole Foods Market’s management structure is regionally-based, and each of the regional groups (and separate corporate entities) have broad, independent responsibility for day-to-day operations at individual stores. In the case of this settlement, it was Whole Foods Market, as the parent company, who voluntarily approached EPA Headquarters about entering into a nationwide settlement to cover all of its regional subsidiaries operating stores located in all of the other regions and states. Whole Foods Market has already started to implement a substantial program to comply with RCRA, and in many instances goes above and beyond compliance for CESQGs (e.g., employee training on hazardous waste management). Since this matter consists of unusual circumstances, Complainant made a downward adjustment of 27.2% based on this factor.

### *b. Cooperation*

Under the Penalty Policy, EPA may reduce the gravity-based penalty up to 10% based on the respondent’s cooperation and preparedness during the settlement process.<sup>21</sup> As noted above, Whole Foods Market voluntarily approached the Agency, without the need for the expenditure of Agency inspection or investigatory resources, and engaged in expedited settlement discussions. Throughout the negotiations, Respondents cooperated with EPA’s need for information regarding Whole Foods Market’s corporate and management structure, as well as past and present hazardous waste management practices. Whole Foods Market negotiated in good faith and provided all information requested without the need for formal information requests. Complainant believes that this level of cooperation warrants the maximum downward adjustment of 10%.

### *c. Litigation Risk*

The Penalty Policy states that “[d]ownward adjustments based on . . . litigative risk will vary in amount depending on the individual facts present in a given case. . . .”<sup>22</sup> The Penalty Policy allows EPA to make downward adjustments to the penalty based on a number of litigation related factors, such as the availability of evidence, the strength of the respondent’s legal and equitable defenses, and any disproportionate resource outlay involved in litigating a case that it might avoid by entering into a settlement.<sup>23</sup> Whole Foods Market and EPA agreed to seek a negotiated resolution of this matter.

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<sup>18</sup> RCRA Civil Penalty Policy at 35.

<sup>19</sup> *Id.*

<sup>20</sup> Whole Foods Market Rocky Mountain/Southwest, L.P. and Whole Food Company, Inc. (see Footnote 6, *supra*).

<sup>21</sup> RCRA Civil Penalty Policy at 41.

<sup>22</sup> RCRA Civil Penalty Policy at 35.

<sup>23</sup> *Id.* at 40.

Complainant gathered enough information to assess whether Whole Foods Market had failed to comply with the two RCRA requirements, taken actions to develop and implement a compliance program, and to calculate an appropriate penalty. To litigate a case against Whole Foods Market for violations of RCRA, Complainant would have incurred substantial costs, due to the number of stores owned and operated by Whole Foods Market. These activities would have taken considerable time and expense. Based on these considerations, Complainant made a downward adjustment to the gravity-based penalty of 25%.

Based on the above considerations and adjustments, EPA calculated an adjusted gravity-based penalty of **\$1,999,296**.

### **3. Economic Benefit**

The Penalty Policy requires EPA to “evaluate the economic benefit of noncompliance when penalties are calculated.”<sup>24</sup> Using EPA’s BEN model and EPA guidance entitled “Estimating Costs for the Economic Benefits of RCRA Non-compliance” (1997) (hereinafter “EPA RCRA EB Cost Estimates”), Complainant calculated an economic benefit of noncompliance for the delayed costs associated with Whole Foods Market’s failure to properly make hazardous waste determinations.<sup>25</sup> The Penalty Policy states that “enforcement personnel should rely on the least expensive costs of compliance (i.e., facility expenditures) in calculating economic benefit penalties.”<sup>26</sup> Under RCRA, a generator is required to make a determination as to whether or not their wastes are hazardous—this may be done by testing the waste or “[a]pplying knowledge of the characteristics of the waste, in light of the materials or the processes used.”<sup>27</sup> The EPA RCRA EB Cost Estimates states that if the generator chooses to make the waste determination based on knowledge of the waste, the costs for the determination would consist only of a review of background information.<sup>28</sup>

Pursuant to the Penalty Policy, EPA has the discretion to forego the economic benefit if it is less than a certain de minimis amount for all violations alleged in the CAFO.<sup>29</sup> Since Whole Foods Market’s management structure is regional, Complainant assumed that each region would likely make one hazardous waste determination of a waste stream and communicate it with all other stores within that particular region. Based on this assumption, EPA determined that Whole Foods Market’s economic benefit is less than the de minimis amounts shown in the Penalty Policy.<sup>30</sup> Alternatively, Whole Foods Market’s staff may have been able to make such determinations at no additional cost to Respondents beyond salaries already paid. Thus, the economic benefit for Whole Foods Market’s failure to properly conduct hazardous waste determinations was not included in this proposed penalty.

### **4. Total Civil Penalty**

Based on EPA’s gravity-based calculations and adjustments, and prior to mitigation for the SEP, the civil penalty is \$2,000,000 (rounded to the nearest million). As discussed in the following section,

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<sup>24</sup> *Id.* at 28.

<sup>25</sup> EPA, Estimating Costs for the Economic Benefits of RCRA Non-compliance (1997), available at: <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=D2676FA609D5E7C564D536A5866FDD18?doi=10.1.1.470.2131&rep=rep1&type=pdf>.

<sup>26</sup> *RCRA Civil Penalty Policy* at 31 (reiterating what is discussed the BEN Users Manual).

<sup>27</sup> 40 C.F.R. § 262.11(c).

<sup>28</sup> EPA, Estimating Costs for the Economic Benefits of RCRA Non-compliance (1997), Chapter 6 – Hazardous Waste Determination, pg. 6-3.

<sup>29</sup> *Id.*

<sup>30</sup> *RCRA Civil Penalty Policy* at 28.



because the Respondent has agreed to perform a \$2,750,000 SEP, Complainant has mitigated \$1,500,000 of the penalty for a final civil penalty of \$500,000.

#### **D. Supplemental Environmental Projects**

Under this Consent Agreement, Whole Foods Market will perform a SEP to replace fluorescent lighting ballasts that may contain polychlorinated biphenyls (“PCBs”), along with associated light bulbs in public schools and community centers serving children (e.g., day-care centers) located in low to moderate income areas that are within a fifty (50) mile radius of a Whole Foods Market Store covered by the attached CAFO.<sup>31</sup> Whole Foods Market will also provide training to school and community center personnel, specifically teaching them about the proper identification, handling and disposal of hazardous wastes located and used in the schools and community centers where the SEP is performed. Whole Foods Market will spend a total of \$2,750,000 on this SEP. This proposed SEP is consistent with Section IX (Calculation of Final Settlement Penalty) of EPA’s SEP Policy,<sup>32</sup> which sets forth the process by which EPA determines the appropriate mitigation percentage and mitigation amount in settlements that include SEPs. This proposed SEP will eliminate the generation of a pollutant, specifically PCBs, and will provide significant and continuing benefits to children, as well as public school/community center employees in communities with environmental justice concerns. As discussed in more detail in this section, this SEP comports with all applicable requirements of the SEP Policy, and is consistent with the SEP Policy’s mitigation provisions; therefore, Complainant has reduced the penalty calculated under the Penalty Policy by \$1,500,000.

This SEP, which is focused on reducing the exposure of children to sources of PCBs and hazardous wastes, directly supports EPA’s mission of protecting children’s health from environmental risks, and because it is required to be implemented in low- to middle-income areas, also directly supports the Agency’s environmental justice objectives.<sup>33</sup>

##### **1. Legal Guidelines**

The SEP meets all of the Legal Guidelines<sup>34</sup> specified in the SEP Policy. Nexus—the relationship between the violation and the project—is established as follows: First, the training to be provided to school and community center personnel in the proper identification, management, handling and disposal of hazardous wastes relates directly to the RCRA violations at issue in this matter. Second, by reducing the potential exposure of children (and others) to PCBs, there is nexus on the basis of the health effects of the wastes involved.<sup>35</sup> Among the returned consumer products which, if they can no longer be re-stocked/re-sold, are required to be managed as hazardous waste are mercury-containing light bulbs. The adverse health effects of exposure to mercury include neurological damage and other cognitive impairments, damage to or loss of vision or other visual injury, and elevated blood pressure, among

<sup>31</sup> See Appendix G of the attached CAFO.

<sup>32</sup> EPA, Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy (March 10, 2015), available at: <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>.

<sup>33</sup> SEP Policy §§ II.A (“Children’s Health”) & II.B (“Environmental Justice”); Exec. Order No. 13045, *Protection of Children from Environmental Health Risks and Safety Risks*, 62 Fed. Reg. 19,885 (Apr. 23, 1997); Exec. Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

<sup>34</sup> SEP Policy § IV.

<sup>35</sup> *Id.*, at § IV.A.3.b (a project must demonstrate that it is designed to reduce “the adverse impact to public health and/or the environment to which the violation at issue contributes”).



other effects.<sup>36</sup> Children are especially vulnerable to the effects of mercury.<sup>37</sup> The health effects of exposure to PCBs are similar to mercury, including damage to neurological, cognitive, and visual functioning, elevated blood pressure, and other damage.<sup>38</sup> Likewise, the damage to children's health from PCB exposure is also greater than for adults.<sup>39</sup>

Work under the SEP will be performed in the same geographical area where the violation occurred (within 50 miles of a Whole Foods Market store covered by the settlement).<sup>40</sup> Whole Foods Market has also conducted a reasonable inquiry to ensure that the SEP does not augment federal appropriations, and Paragraph 11 of the SEP Appendix includes Whole Foods Market's certification to this effect. Finally, EPA does not manage or control the SEP, and while the SEP allows Whole Foods Market to use a contractor to assist it in implementing the SEP, EPA has no role in the identification or selection of the contractor.

## **2. SEP Category**

This SEP has attributes of several SEP categories listed in the SEP Policy. The hazardous waste training component is clearly within the "environmental compliance promotion" category because it "provides training or technical support to other members of the regulated community in order to . . . identify, achieve and maintain compliance with applicable statutory and regulatory requirements . . . ."<sup>41</sup> The removal of harmful PCBs from schools and community centers (and their proper disposal) qualifies as a "pollution reduction" project because it "results in a decrease in the amount . . . of any hazardous substance, pollutant, or contaminant [from] being released into the environment."<sup>42</sup> While the removal of PCB fixtures has obvious public health benefits, and the replacement of older lighting fixtures with new, energy efficient fixtures has other pollutant benefits by reducing energy demand, to the extent that these attributes of the SEP are not squarely covered by the existing SEP categories, they are covered by the "other types of projects" category.<sup>43</sup>

## **3. Penalty Mitigation, Minimum Penalty and Other Requirements**

The SEP Policy provides, with certain exceptions not applicable in this case, that the "amount of penalty mitigation given for a SEP should be equivalent to a percentage of the estimated cost to implement the SEP and should not exceed eighty percent (80%) of that estimated cost."<sup>44</sup> In this case, Complainant

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<sup>36</sup> See generally EPA, "Health Effects of Exposures to Mercury," available at: <https://www.epa.gov/mercury/health-effects-exposures-mercury>) (hereinafter *EPA, Health Effects of Mercury*); Agency for Toxic Substances and Disease Registry, "Public Health Statement for Mercury" (March 1999), available at: <https://www.atsdr.cdc.gov/phs/phs.asp?id=112&tid=24> (hereinafter *ASTDR, Health Effects of Mercury*).

<sup>37</sup> *ASTDR, Health Effects of Mercury*, *supra* note 36 ("Very young children are more sensitive to mercury than adults.")

<sup>38</sup> See generally EPA, "Health Effects of PCBs," available at: <https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs#healtheffects>; Agency for Toxic Substances and Disease Registry, "What Are Adverse Health Effects of PCB Exposure?" (May 2016), available at <https://www.atsdr.cdc.gov/csem/csem.asp?csem=30&po=10>.

<sup>39</sup> EPA, "Rules and Regulations That Impact Children's Health," available at: <https://www.epa.gov/children/rules-and-regulations-impact-childrens-health> ("Exposure to PCBs during . . . childhood is of great concern because the effects of PCBs on sensitive immature tissues, organs, and systems can have serious and long-lasting consequences.")

<sup>40</sup> SEP Policy § IV.A.3, footnote 9 and accompanying text.

<sup>41</sup> *Id.* at § V.F.

<sup>42</sup> *Id.* at § V.C.

<sup>43</sup> *Id.* at § V.H. Such "other SEP types" require the advance approval of the appropriate enforcement director in OECA and consultation with the National SEP Policy Coordinators in OCE. In this case, the SEP was developed in coordination with OCE's SEP Policy coordinators and with the approval of OCE's Associate Office Director, in consultation with the Waste Chemical Enforcement Division.

<sup>44</sup> *Id.* at § IX.C.1.



mitigated approximately 54.5% of the \$2,750,000 cost of the SEP, or \$1,500,000, of the penalty, well under the 80% maximum.

The SEP Policy also requires a minimum civil penalty that is either (1) the economic benefit of noncompliance plus ten percent of the gravity component, or (2) twenty-five percent of the gravity component, whichever is greater. As discussed above in the “Economic Benefit” section of this memorandum (Section C.3), economic benefit was not included in the penalty in this matter; therefore, the minimum penalty is required to be twenty-five percent of the gravity component. In this case, the gravity component was calculated under the Penalty Policy to be \$1,999,296 and the \$500,000 penalty agreed to by Whole Foods Market is slightly greater than the twenty-five percent minimum.

Finally, the CAFO and SEP Appendix include a full description of the SEP, provisions for stipulated penalties for noncompliance with the SEP, the required certifications and disclosure provisions, and a SEP completion report.

#### **E. Human Health and Environmental Concerns Raised by Violations**

Although Respondents’ RCRA violations presented harm to public health and the environment through potential exposure to hazardous wastes, there is no evidence of any actual harm that was caused by their noncompliance.

#### **F. Disposition of Substances**

The hazardous materials at issue in this case have been properly disposed of in accordance with federal and state law.

#### **G. Past or Pending Actions**

As described in the “Statement of the Facts” section of this memorandum, Region 6 commenced and concluded five administrative actions against Whole Foods Market, resolving similar RCRA violations in Texas, Oklahoma, New Mexico, Louisiana and Arkansas. The settlements were approved by the Regional Judicial Officer on September 19, 2016. *See* USEPA Docket Nos. RCRA-06-2016-0904 through 0908.

#### **H. The Public Interest is Served by the Agreement**

The public interest is served by this agreement because it assesses a penalty for Whole Foods Market’s past violations and requires the company to undertake specific actions to help prevent similar violations in the future.

#### **I. Recommendation**

Complainant believes that the final settlement penalty of \$500,000, SEP expenditure of \$2,275,000, as well as the injunctive relief and independent third party audit set forth in the attached Consent Agreement is appropriate to resolve Whole Foods Market’s violations.



For the foregoing reasons, I recommend that the EAB approve the Consent Agreement and sign the proposed Final Order. Please address any questions concerning this memorandum or the attached Consent Agreement to Laura K. Welles at 202-564-2754.

#### Attachments

cc: Laura K. Welles  
Counsel for Complainant

John H. Hempfling II  
Counsel for Respondent

Jennifer Hartman King  
Counsel for Respondent